No. 14-86

IN THE

# Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

*Petitioner,*

v.

ABERCROMBIE & FITCH STORES, INC.,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

The question originally presented by Petitioner was whether an employer can be liable under Title VII for refusing to hire an applicant or for discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

The question now actually presented by Petitioner's brief is whether an employer engages in *intentional* religious discrimination by enforcing a *religion-neutral* employment policy against an employee or applicant if the employer correctly assumes that the individual's non-compliance is motivated by religion.

## RULE 29.6 STATEMENT

Respondent Abercrombie & Fitch Stores, Inc.'s parent corporation, Abercrombie & Fitch Co., is a publicly traded company. No other publicly held corporation owns 10% or more of Respondent's stock.

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## STATEMENT

Respondent Abercrombie & Fitch Stores, Inc. ("Abercrombie"), like many retailers, maintains comprehensive dress and grooming standards that generally apply to all customer-facing employees. Abercrombie declined to hire Samantha Elauf because she wore a headscarf that did not comply with these religion-neutral standards, known as the Look Policy. The EEOC claims that Abercrombie thereby engaged in *intentional* religious discrimination under Title VII, entitling the EEOC to monetary damages.

### A. Title VII Distinguishes Intentional Discrimination from Neutral Employment Policies That Burden Protected Traits.

Title VII provides that it is an "unlawful employment practice" for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

1. This Court has long understood Title VII to prohibit two distinct types of discrimination. *First*, and "most easily understood," the statute prohibits adverse actions that are taken with "discriminatory motive," *i.e.*, when the employer's subjective intent is to "treat[] some people less favorably than others because of their race, color, religion, sex, or national origin." *Int'l B'hood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Such intent-based discrimination is known as disparate treatment, or intentional discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

*Second*, this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), concluded that Title VII also proscribes certain employment actions with discriminatory *effects*, even absent intent to treat the protected group differently. *See id.* at 430-32. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation," the Court held, and so policies "neutral on their face, and even neutral in terms of intent," still violate Title VII if they burden a protected attribute and are not justified by the employer's "business necessity." *Id.* That theory of discrimination, which Congress codified by adding to Title VII a special proof framework, 42 U.S.C. § 2000e-2(k), is known as adverse or disparate impact, because of its focus on the effects of the employer's policy, rather than the employer's intent.

This Court has "consistently recognized" the distinction between the two theories, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003), which call for distinct evidentiary frameworks, allow for distinct defenses, and perhaps most importantly, trigger

distinct remedies. In the Civil Rights Act of 1991, Congress amended Title VII to allow compensatory and punitive damages, but only in cases of "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)." 42 U.S.C. § 1981a(a)(1). For the latter, only equitable remedies like backpay, reinstatement, and injunctive relief are available. *Id.* § 2000e-5(g).

2. One of the protected attributes under Title VII is "religion." The statute provides that "religion" includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

In keeping with the general dichotomy of Title VII claims, courts have understood these religious discrimination provisions to prohibit two distinct types of conduct. *First*, Title VII prohibits an employer from treating employees of one religion differently from similarly situated employees of another religion (or no religion). Nor may an employer treat certain religious practices differently from similarly situated practices of other faiths (or secular practices). Either would be "straightforward disparate treatment." *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1037 (10th Cir. 1993); *see also, e.g., Endres v. Ind. State Police*, 334 F.3d 618, 626 (7th Cir. 2003) (allegedly selective enforcement of workplace ban on headwear against only religious hats, but not secular hats).

*Second*, when a neutral employment policy would have adverse *effects* on a religious practice, even absent any discriminatory intent, courts require employers to offer exemptions, or accommodations, if doing so would not impose undue hardship. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 & n.1 (1986). According to the EEOC, such a "religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally." *EEOC Compliance Manual*, No. 915.003 § 12-IV (July 2008) ("*Compliance Manual*"), http://www.eeoc.gov/policy/docs/religion.html. "An individual alleging denial of religious accommodation," by contrast, "is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion." *Id.*

### B. The EEOC Instructs Employees To Ask for Religious Accommodations, Not To Wait for Employers To Offer.

Accommodating religious practices is not always straightforward, in large part because it can be hard to tell who wants or needs accommodation. Religion is "uniquely personal and individual" (Pet.App.48a), and what ultimately matters is if the employee personally engages in a practice for religious reasons—whether the practice is maintaining a beard; observing a day of rest; wearing a head covering, a nose ring, or other jewelry; or myriad other practices that may or may not be religiously motivated. Moreover, an employee need not belong to a well-known or recognized religion to claim protection, 29 C.F.R. § 1605.1, and Title VII's protections apply even if other members of the faith disagree about its requirements.

The EEOC's regulations and guidance have long reflected this difficulty, by acknowledging that it is generally the employee's or applicant's duty ask for an accommodation—not the employer's job to guess. Its regulations thus state that "[*a*]*fter* an employee or prospective employee [has] notif[ied] the employer ... of his or her need for a religious accommodation," the employer has an "obligation to reasonably accommodate." *Id.* § 1605.2(c)(1) (emphasis added). And its Compliance Manual similarly instructs:

> An applicant or employee who seeks religious accommodation *must* make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it.

*Compliance Manual*, § 12-IV.A.1 (emphasis added).[1]

Employers are not supposed to ask about religious views or practices. "Questions about an applicant's religious affiliation or beliefs ... are generally viewed as non job-related and problematic under federal law." EEOC, *Pre-Employment*

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[1] After the Tenth Circuit rendered its decision below, the EEOC issued a new technical assistance publication stating a very different standard. (*See* Govt.Br.32.) *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm ("*Religious Garb Guidance*"). It says that employers must make applicants or employees aware of workplace rules before the latter have a duty to request accommodation, and provides examples modeled after this case. *See id.* Exs. 7, 11.

*Inquiries and Religious Affiliation or Beliefs*, ("*Pre-Employment Inquiries*"), http://www.eeoc.gov/laws/practices/inquiries_religious.cfm. Employers should thus "avoid assumptions or stereotypes about what constitutes a religious belief," and managers "should be trained not to engage in stereotyping based on religious dress and grooming practices." EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace* ("*Best Practices*"), http://www.eeoc.gov/policy/docs/best_practices_religion.html.

### C. Abercrombie Thrives Because of Its Strong Brand Identity.

Abercrombie runs a family of clothing stores that market three clothing brands to three audiences. The original store, Abercrombie & Fitch, sells rugged casual wear modeled after the preppy look of the Ivy League to older high school and college students, while abercrombie kids offers a similar look to pre-teens and middle schoolers. The third store, Hollister, sells casual clothing inspired by Southern California to high schoolers. JA179-80.

These target demographics are tough customers. Even after a company attracts them, it must retain them through the vicissitudes of teen and young adult fashion. And even if it successfully retains them, it does so only for a limited time; by definition, they soon age out of the demographic, replaced by new customers, often with distinct tastes. JA169; JA171-72. On top of this, youth clothing retailers face intense market competition. JA161.

To stand out, apparel retailers rely on the strength of their brands. Young customers express their developing sense of self by purchasing from clearly identified brands. JA164; JA167-69. And by

maintaining strong brands, retailers can attract customers more likely to make purchases, pay a premium when doing so, and recommend products to others. JA164-65. To work, though, brand identities must be carefully maintained and consistently presented. JA176-78. Today's young customers are the most brand-conscious in history. JA169-71. Messages that deviate from a brand's core identity weaken the brand and reduce its value. JA173-74.

Unlike many competitors, Abercrombie does very little traditional advertising. JA44-45; JA156; JA240-41. Instead, it focuses almost entirely on creating a unique in-store experience. Everything from distinct lighting and custom fragrances to specifically chosen music is designed to transport the customer from a "generic mall" to a location reflecting the brands' styles, be it a prep school hangout (for abercrombie kids), the Huntington Beach Pier (for Hollister), or a club (for Abercrombie & Fitch). JA190-92. Abercrombie has thrived in a competitive market by harnessing the power of its carefully managed brands.

### D. Abercrombie Protects and Promotes Its Brand Through Its Look Policy.

As courts have recognized, "the appearance of a company's employees may contribute greatly to the company's image and success with the public." *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985). Indeed, Abercrombie's employees stand at the center of its efforts to create a strong in-store brand experience. JA199-200. As one executive explained, when customers walk into the store, "the first part of [Abercrombie's] advertising" (JA240-41), is to ensure that they see floor associates, referred to as Models,

who "project[] and protect[] the image of the brand through personal style" (JA105).

To ensure consistent brand messaging, Abercrombie has adopted the detailed dress and grooming standards contained in the Look Policy. The Look Policy requires employees to "wear clothes that are similar to the Abercrombie & Fitch brand." JA124. It also contains a host of more specific proscriptions. For example, it prohibits facial hair, obvious tattoos, and long fingernails, and it sets forth guidelines regarding how employees may style their hair and wear their makeup. JA125-27. At the time in question here, the Look Policy also explained that "[e]ven though A&F sells caps, they are considered, too informal for the image we project. Caps are not allowed to be worn on the sales floor." JA127. That policy, one executive explained, "extends beyond caps to apply to all headgear" (JA205), in keeping with the general rule that employees may only wear clothing similar to what Abercrombie sells.

The Look Policy is crucial to Abercrombie's success (JA203-206), and complying with it is an important part of a Model's job (JA220-21). The job description provides that Models will "represent[] the brand" by "[c]reat[ing] a fun and engaging environment," "upholding Abercrombie's vision and standards," and "[a]dher[ing] to Abercrombie guidelines in personal appearance." JA106. In addition, the Model Group Interview Guide instructs interviewers to assess whether a candidate will "wear[] clothes that fit the brand and set[] the example of the brand lifestyle." JA112; *see also id.* (assessing whether candidates wear "clothes ... that are consistent with the Abercrombie brand").

During the time in question, at the end of every interview, the Abercrombie manager would read a description of the Look Policy, informing applicants that they must wear clothing similar to what Abercrombie sells and otherwise follow specific dress and grooming guidelines. The manager would also ask if applicants have any questions about the Look Policy. JA32-33; JA63-64.

Notwithstanding the importance of the Look Policy, Abercrombie has established procedures to offer limited exceptions where doing so would not cause undue hardship. Rather than train the managers "in any of [its] 1,100 stores" "to be H[uman] R[esources] experts," Abercrombie instructs them that if an applicant or employee requests an accommodation, or if a store manager has an accommodation-related question, the manager should call Abercrombie's H.R. professionals using a special hotline. JA46-47. Those professionals evaluate the request and "try to find some way to make the accommodation," provided that one can be offered "without undue burden; i.e., taking us off brand." JA50. Abercrombie has granted religious exemptions over the years to employees who have requested them, including to Muslim employees (D.Ct. Dkt. 68-7, at 12-33), after "evaluat[ing] them on a case-by-case basis" to ensure that it grants reasonable requests while still being "careful ... about the brand and [its] marketing" (JA247-48).

### E. Abercrombie Declined To Hire Elauf Because She Did Not Comply with Its Look Policy or Request Accommodation.

In 2008, Samantha Elauf applied for a Model position at an abercrombie kids store. JA19-20.

While some women wear headscarves for non-religious cultural or political reasons (JA236-38), or simply as a style preference, Elauf wears one for religious reasons (JA18). She knew, however, that Abercrombie expects its employees to wear clothing similar to the clothes it sells; as Elauf's friend Farisa Sepahvand, herself an Abercrombie employee at the time, put it, "[i]t's kind of common sense. ... [W]hen you go in the store, everyone's ... wearing polos and regular jeans and white Converse." JA255; *see also* JA23. Accordingly, before applying, Elauf asked Sepahvand whether she could work at Abercrombie and wear a headscarf. JA23; JA26-27.

Sepahvand asked one of the store's assistant managers, who stated that he thought it should be "okay," provided that the headscarf was not black; Abercrombie did not sell black clothes, so it generally did not permit employees to wear them. JA40-41; JA253-54. Sepahvand, in turn, told Elauf that she could not wear a black headscarf. JA26-27. Elauf knew that Abercrombie also did not generally sell headscarves. JA37-38.

When Elauf applied for a Model position, she met with another one of the store's assistant managers, Heather Cooke. JA26. Despite Sepahvand's advice, Elauf wore a black headscarf to the interview, similar to the ones depicted in the photographs of Elauf found at JA130-31. JA75-76. Unlike the hijabs frequently worn by devout Muslim women, Elauf's headscarves do not cover her neck and are not tightly bound. JA17-18. Indeed, she generally purchased her scarves—the sort that women might wear as a fashion statement—at ordinary clothing stores in the mall. JA37.

Cooke followed Abercrombie's Model Group Interview Guide. JA63; JA109-120. Cooke "knew that head wear and black items were prohibited by" the Look Policy (JA104), but she did not ask Elauf about headscarves in general or black ones in particular, since the standard script did not include such questions (JA80-81). Elauf also made no mention of her headscarf, and neither she nor Cooke mentioned religion. JA31; JA33; JA78-79. At the end of the interview, Cooke read the Interview Guide's description of the Look Policy, informing Elauf that employees had to "wear clothing that ... looked like Abercrombie" and follow other dress and grooming guidelines. JA33; JA100-101. Despite being prompted, Elauf asked no questions. JA31-32.

Cooke "had never interviewed anybody that wore a head scarf." JA79. While she ordinarily had authority to hire employees, she was supposed to ask her store or district manager if she "had a question about something"—including the Look Policy—in the hiring process. JA55-56; *see also* JA79 (Cooke had asked her store manager about other forbidden items such as tattoos or piercings after other interviews).

Cooke accordingly contacted Randall Johnson, her district manager, to "ask" for "[his] permission" to hire Elauf despite her headscarf. JA140. Cooke—who "did not" then "*know*" Elauf's religion—"assume[d]" she was Muslim, and "figured" she wore her headscarf for religious reasons. JA76-77; JA102 (emphasis added). According to Johnson, Cooke did not share her belief that Elauf wore the headscarf for religious reasons; he otherwise would have "roll[ed] [the issue] up to HR" in accordance with his training. JA146. Cooke testified, though, that she told

Johnson she "believe[d]" the headscarf was religious. JA87. Either way, both agreed that Johnson instructed Cooke not to hire Elauf. In Cooke's words, Johnson "told [her] not to hire [Elauf] because she had a head scarf." *Id.* As Johnson put it, he told Cooke that "[y]ou cannot hire her" because "she's not compliant with [the] dress code." JA134; JA140.

Johnson further testified that he would have taken the same action with respect to any headwear, whether a headscarf, a yarmulke, a hat, a ball cap, or a helmet, because each conflicted with the Look Policy. JA144. Johnson made no disparaging remarks about Elauf, Islam, or the headscarf during the conversation or at any other time. JA89.

Although Cooke still wished to hire Elauf, she followed Johnson's order and did not do so. JA91.

### F. The District Court Granted Summary Judgment Against Abercrombie on the EEOC's Failure-To-Accommodate Claim.

The EEOC sued Abercrombie on Elauf's behalf, seeking money damages as well as injunctive relief. Compl., D.Ct. Dkt. 2, ¶¶A-E. It did not claim that Abercrombie or its employees harbored animus toward Muslims or that the Look Policy was a pretext for discrimination against Muslims. Rather, it contended that Abercrombie "failed to accommodate [Elauf's] religious beliefs by making an exception to the Look Policy." *Id.* ¶6.

The district court granted partial summary judgment on liability to the EEOC, denying Abercrombie's cross-motion. Pet.App.92a-120a. It applied the framework from *Thomas v. National Association of Letter Carriers*, 225 F.3d 1149 (10th

Cir. 2000), which requires the plaintiff to show, in an accommodation case, that she "had a bona fide religious belief that conflicts with an employment requirement," "informed the employer of this belief," and "was not hired for failing to comply with the employment requirement." Pet.App.108a-109a.

Focusing primarily on the notice requirement, the court held the EEOC had made its *prima facie* case. On the district court's view, an employer has sufficient notice if it "has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." Pet.App.115a. Because it was supposedly "undisputed" that "Cooke knew [Elauf] wore the head scarf based on her religious belief," the court found adequate notice here and imputed it to Abercrombie. Pet.App.117a & n.10. The court also rejected Abercrombie's undue hardship defense, which was based on the importance of its branding, because Abercrombie had supported its defense with expert testimony but not *statistical* proof that exceptions to the Look Policy would hurt its sales. Pet.App.118a-120a. Abercrombie had also allowed limited exceptions, the court noted. Pet.App.119a.

At a trial on remedies, the jury awarded $20,000 in compensatory damages but no punitive damages. The EEOC did not receive any injunctive relief. Pet.App.12a. Abercrombie appealed; the EEOC did not cross-appeal as to remedies. *Id.*

### G. The Tenth Circuit Reversed.

The Tenth Circuit reversed and ordered that summary judgment be granted for Abercrombie. Treating the claim as a "religious accommodation

claim," which is "distinct from a disparate treatment claim" (Pet.App.23a), the court applied the same framework as the district court. It held, however, that to be liable for failure to accommodate, the employer must at least have had "*actual* knowledge of the key facts that trigger its duty to accommodate," namely that the employee's practice was religious. Pet.App.34a, 39a. And, "ordinarily," the court elaborated, that means the plaintiff must have informed the employer of the conflicting religious practice. Pet.App.28a.

That conclusion, the court explained, was consistent with most courts' formulation of the notice requirement. Pet.App.30a-31a (collecting cases). It also made sense because Title VII protects only those who want accommodation for religiously motivated practices. Thus, "the key questions that determine whether an employer has an obligation under Title VII to provide a reasonable religious accommodation ordinarily are only within the ken of the applicant or employee," no matter what appearances might suggest. Pet.App.46a; *see also* Pet.App.46a-53a. The court reasoned that employers should not be induced to stereotype or pry into employees' religious lives to identify possible conflicts with neutral work rules, which would be the inevitable result of the EEOC's position. Pet.App.54a-55a.

Moreover, the EEOC's own materials "repeatedly, expressly, and unequivocally ... assign the notice responsibility to the applicant or employee." Pet.App.55a-58a (citing 29 C.F.R. § 1605.2(c)(1); *Compliance Manual*, § 12-IV.A.1; *Best Practices*). The court rejected the EEOC's request for deference to its contrary understanding of its regulation under

*Auer v. Robbins*, 519 U.S. 452 (1997), because the EEOC's new position conflicted with the regulation's text, departed from prior statements, and provided insufficient notice to employers. Pet.App.58a-68a.

The court also compared its understanding of the notice requirement to the analogous requirement under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). Courts have held that an employee must "make clear" that he "wants assistance" for his disability before an ADA accommodation duty attaches. Pet.App.69a; *see* Pet.App.69a-70a (collecting cases). And the EEOC agrees: The "process of determining the appropriate reasonable accommodation" begins "[o]nce an individual with a disability has requested" one, 29 C.F.R. § 1630, App.; as such, "the obligation [to ask] generally rests with the employee," EEOC, *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities* (Sept. 2008), http://www.eeoc.gov/facts/performance-conduct.html.

Here, Elauf never identified her headscarf as religious, nor did Abercrombie have actual knowledge of that fact from any other source. Pet.App.28a, 39a-40a. Notably, Cooke "did not know" Elauf's religion, but only "*assumed*" she was Muslim and "*figured*" that was the reason for her headscarf. Pet.App.40a. Given the personal nature of religion, Cooke could not have *known* from seeing Elauf that she wore the headscarf for that reason. Pet.App.41a. Nor did it matter that her assumption proved correct. An employer cannot know if an assumption is correct without asking the employee. Thus, on the EEOC's view, employers would be forced to probe suspected

religious beliefs or risk a lawsuit. Pet.App.41a n.9. Finally, because Cooke lacked actual knowledge, so did Johnson, who could only have learned as much about Elauf as Cooke knew. Pet.App.42a-44a.

Judge Ebel dissented in part, reasoning that some plaintiffs can state a claim by showing that they were not aware of a work rule that conflicted with their religious practice, their employer knew they "might hold" conflicting religious beliefs, and the employer refused to hire them because of that practice. Pet.App.81a-82a. He concluded, however, that factual disputes, including on Abercrombie's undue hardship defense, precluded summary judgment for the EEOC. Pet.App.90a-91a & n.12.

The Tenth Circuit denied rehearing en banc (Pet.App.122a), and this Court granted certiorari.

## SUMMARY OF ARGUMENT

The EEOC's original question presented asked whether an employer who declines to hire an applicant based on her "religious practice" violates Title VII's religious discrimination provisions even if the employer did not have "actual knowledge" that the practice was in fact religious. That scenario arises if the applicant's religious practice conflicts with a neutral workplace rule but the applicant (for whatever reason) does not identify the conflict or ask for accommodation. The employer in that case would not know that the non-compliant conduct is motivated by religious belief. Does refusal to hire that applicant violate Title VII?

I. The EEOC's answer in this Court, markedly different from its approach below or in its petition, is that such an employer is liable on a *disparate-treatment* theory of discrimination, so long as it "correctly" assumed that the applicant's practice was religious in nature. On that view, an employer that enforces a *neutral* workplace rule in the face of such an assumption is *intentionally discriminating* based on religion. The EEOC says that Abercrombie thus subjected Elauf to *disparate* treatment "because of" her religion by subjecting her to the *same* policy as non-religious applicants or employees who wear head coverings for cultural, political, or aesthetic reasons.

That is a bizarre position. This Court's decisions could hardly be clearer: Intentional discrimination occurs when a decision is made *because of*, not *in spite of*, the protected trait. A decision that is not *motivated by* the protected trait does not become intentionally discriminatory simply because the employer is *aware of its effects* on someone with the

trait. Thus, an employer who enforces a neutral policy with incidental effects on a religious practice—and would have applied the same policy even if the practice were secular—is not engaged in disparate treatment based on religion. Put another way, neither a "correct understanding" nor even "actual knowledge" that a practice is religious suffices for intentional discrimination; only *intent* does.

Of course, Title VII's religious discrimination provisions—just like Title VII in general—proscribe more than just intentional discrimination. A claim may instead attack the discriminatory effects of an employer's policy, what lower courts and the EEOC have called a failure-to-accommodate theory. Indeed, the lower courts analyzed this case on that conceptually and doctrinally distinct theory, and this Court granted review on the same understanding.

But the EEOC in its brief has now abandoned that accommodation theory in favor of a disparate-treatment claim. It had no choice, because the only remedy at issue here is compensatory damages—relief only available for intentional discrimination. The EEOC is thus forced to take the position that an employer engages in disparate treatment by treating religiously motivated violations of neutral work rules *the same* as secular violations, rather than granting favored treatment to religion. Since this untenable intentional-discrimination claim is the only one advanced in this Court and the only one upon which relief could be granted, the judgment below should be affirmed; there is no basis to determine here the parameters of, or circumstances triggering, a distinct Title VII duty to affirmatively accommodate religion.

II. If this Court were to reach that issue, however, it should hold that only *actual* knowledge of a religious conflict, not a mere *guess*, gives rise to Title VII liability, and it should affirm for that reason.

That has been the established rule for over forty years: Employees and applicants have told employers if they need religious accommodations, eliminating any need to speculate, guess, or probe. Indeed, that is how the EEOC itself directed that accommodation discussions should begin, and it is how the ADA duty to accommodate disabilities is triggered. This is not some technical "magic words" requirement, just a recognition that *someone* must initiate the request, and that employees are usually better suited to do so. The EEOC objects that *some* applicants may not be, if they are unaware of the conflicting work rules, but that attenuated hypothetical (which is not presented here or in any other cited case) is no reason for a general rule shifting the burden to employers, particularly given the host of counterproductive consequences of such a regime. Imposing duties on employers whenever they "suspect" any "possible" conflict with religion (Govt.Br.21) has no basis in Title VII or any caselaw. It would also subject employers to an unfair Catch-22 and induce the very stereotyping that Title VII is meant to prevent, as employers attempt to avoid litigation by preemptively probing the suspected religious views of their employees.

III. At a minimum, factual disputes over the actual decisionmaker's true "understanding" here mean that, even if the Court accepts the EEOC's novel legal rule, it should remand for trial, rather than grant partial summary judgment to the EEOC.

## ARGUMENT

### I. THE EEOC CANNOT SHOW INTENTIONAL DISCRIMINATION, BUT MUST DO SO TO JUSTIFY THE SOLE RELIEF AT ISSUE HERE.

In this Court, the EEOC for the first time presents its theory as "intentional discrimination" or "disparate treatment." (Govt.Br.19.) It has no choice: That is the only claim that allows for compensatory damages, the sole relief at issue here, as opposed to backpay, reinstatement, or an injunction. 42 U.S.C. § 1981a(a)(1). But an employer who fails to make an *exception* to a *neutral* workplace rule is inherently not engaged in disparate treatment, which occurs when people are treated *differently* due to religion. Here, the EEOC alleges only that Abercrombie treated Elauf's religious headwear the *same* as non-religious headwear. To be sure, Title VII may require exemptions to a neutral policy burdening religion (subject to applicable defenses). But such a failure to accommodate religion is not *intentional* discrimination—as this Court, all the lower courts, Congress, and the EEOC itself have long recognized.

#### A. The EEOC Must Establish Intentional Discrimination To Obtain Reversal Here.

As this case comes to this Court, compensatory damages are the only relief at stake. The EEOC did not seek backpay because Elauf obtained a different job days after Abercrombie declined to hire her. D.Ct. Dkt. 151, at 2. The EEOC's request for an injunction was denied (Pet.App.12a), and the EEOC did not cross-appeal, so that relief was "not properly before the Court of Appeals." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999). Only the compensatory damages award was at issue on appeal.

To justify reversing the Tenth Circuit's judgment, the EEOC must accordingly invoke a theory allowing such damages, or else that court was correct to dismiss the EEOC's claim. *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) ("Because the relief sought ... is unavailable as a matter of law, the case must be dismissed."). And, under Title VII, only *intentional* discrimination fits that bill. When Congress in 1991 expanded the remedies in Title VII cases to include compensatory and punitive damages, it did so only for "cases of 'intentional discrimination.'" *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (quoting 42 U.S.C. § 1981a(a)(1)). As Congress noted: "Virtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally"; employers who "have not accepted" that principle "should now be subjected to a damage remedy." H.R. Rep. No. 101-644, pt. 1 at 9 (1990). But other claims under Title VII remain limited to the statute's default equitable remedies, like backpay and reinstatement. 42 U.S.C. § 2000e-5(g)(1).

### B. Denying an Exemption from a Neutral Rule Is Not Intentional Discrimination.

The EEOC claims that Abercrombie refused to hire Elauf because her headscarf did not comply with its Look Policy, a facially neutral dress code. It has made no claim that the Look Policy was, in its design or enforcement, a pretext for discrimination against Muslims. Rather, the EEOC's sole allegation is that Abercrombie "failed to accommodate [Elauf's] religious beliefs by making an exception to the Look Policy." Compl., D.Ct. Dkt. 2, ¶6. That is not a claim of intentional discrimination, since *any* headwear—religious or not—would have been treated the same.

1. Intentional discrimination, also known as disparate treatment, *Reeves*, 530 U.S. at 153, occurs when an employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters*, 431 U.S. at 335 n.15. The *sine qua non* of such a claim is "[p]roof of discriminatory motive." *Id.* A disparate-treatment plaintiff therefore must establish that he was treated worse than a similarly situated person not possessing the protected trait. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

Such disfavored treatment because of religion may stem from animus, *e.g.*, *Shapolia*, 992 F.2d at 1037 ("animus directed against non-Mormons"), or preference for one's own religion, *e.g.*, *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) (employee allegedly fired for not "follow[ing] [her] employer's religious beliefs"). Or there may be more benign reasons for intentional religious classification. *E.g.*, *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 531 (5th Cir. 1986) (medical program excluded Jews from rotation in Saudi Arabia due to concern about visas). Whatever its basis, intentionally treating people differently on account of their religion is prohibited disparate treatment.

Because "religion" in Title VII includes religious "practice," 42 U.S.C. § 2000e(j), disparate treatment based on religion also occurs if an employer treats religious practices (or certain religious practices) less favorably than secular (or other denominational) analogues. *E.g.*, *Endres*, 334 F.3d at 626 (ban on headwear allegedly applied only to religious hats); *Dixon v. Hallmark Cos.*, 627 F.3d 849, 853 (11th Cir. 2010) (prohibition only of "religious" office displays).

The common denominator in these cases is that the employer takes action *because of* the employee's protected trait; the action would not be taken against similarly situated employees differing only in their faith. Indeed, that is how this Court defines intentional discrimination: action taken "'because of,' not merely 'in spite of,' its adverse effects" on a class. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

By contrast, an employer who applies a neutral policy on equal terms is not treating "some people less favorably than others because of their ... religion." *Teamsters*, 431 U.S. at 335 n.15; *see also Alexander v. Choate*, 469 U.S. 287, 292-94, 301 (1985) (distinguishing failure to make "reasonable accommodations" from "purposeful discrimination"). To the contrary, not drawing exceptions for religion is treating all people *the same*, without regard to religion. Failure to treat religious adherents *more favorably*, by exempting them from rules applied to others, cannot be characterized as treating them "*less favorably* than others because of their ... religion." *Teamsters*, 431 U.S. at 335 n.15 (emphasis added).

Put another way, an employer who acts based on violation of a neutral rule, regardless of the motive for the violation, is *indifferent* to religion. It is not engaged in *intentional* religious discrimination. While an indifferent employer applying a neutral policy may violate Title VII, *see infra*, Part I.C, it cannot do so on an intentional-discrimination theory.

2. The notion that failure to make exceptions to a neutral policy is not intentional discrimination is hardly controversial. To the contrary, it has always been understood—by this Court, the lower courts,

Congress, and even the EEOC itself—that such claims, in effect for failure to accommodate religious practices, involve no discriminatory intent.

a. This Court's first discussion of Title VII's religion provisions squarely refutes the EEOC's current position. In *Trans World Airlines, Inc. v. Hardison*, a neutral seniority system for assigning shifts interfered with Hardison's Sabbath observance, and he so advised his employer. 432 U.S. 63, 67-68 (1977). The employer nonetheless declined to make an exception; Hardison refused to show up and was terminated. *Id.* at 68-69. The employer thus fired Hardison "because of" his Sabbath observance in the same way as Abercrombie, on the EEOC's account, refused to hire Elauf "because of" her headscarf.

On those facts, however, this Court held there was "no suggestion of discriminatory intent." *Id.* at 82. It accordingly invoked a Title VII provision that shields application of a "bona fide seniority or merit system" from challenge *unless* its adverse effects are "the result of an *intention* to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (emphasis added). Under that rule, "a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences," so long as there is no "discriminatory purpose." *Hardison*, 432 U.S. at 82. And because no such purpose existed, holding the seniority system unlawful would have been "plainly inconsistent with the dictates of § [2000e-2(h)]." *Id.*

*Hardison* thus forecloses the EEOC's theory that refusal to accommodate a religious practice—even if the employer correctly understands the religious basis for the practice—is intentional discrimination.

If the EEOC's view were correct, this Court could not have invoked § 2000e-2(h) to shield the assignments produced by TWA's seniority system, as they would necessarily have been "the result of an intention to discriminate because of ... religion."

This Court similarly distinguished intentional discrimination from mere refusal to allow exemptions from neutral rules in explicating the scope of the Free Exercise Clause. Under that Clause, religion-neutral state action is not problematic just because it incidentally burdens religion, *Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990); rather, only state action that "targets religious conduct for distinctive treatment" warrants strict scrutiny, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). That is, intentional religious discrimination is forbidden, but generally applicable rules that happen to burden religion are not. Yet on the EEOC's theory here, any knowing failure to make an exception to a neutral rule is *itself* intentional discrimination, thus wholly conflating what *Smith* held permissible with what it held unconstitutional.

Moreover, as the *Smith* Court explained, the line between intentional discrimination and mere failure to adjust neutral policies is consistent with other constitutional provisions. Just as "race-neutral laws" that have "the *effect*" of "disadvantaging a particular racial group" need not pass strict scrutiny, "religion-neutral laws that have the effect of burdening a particular religious practice" need not, either. *Smith*, 494 U.S. at 886 n.3 (citing *Washington v. Davis*, 426 U.S. 229 (1976)). The Court thus expressly equated the refusal to allow religious exemptions from neutral rules, as in *Smith* and this case, with the disparate-

impact theory rejected in *Washington v. Davis* as the standard governing racial discrimination under the Fourteenth Amendment; and the Court distinguished that type of "discrimination" from the *intentional*-discrimination standard adopted there. This reflects a clear understanding, again, that race-neutral or religion-neutral rules with discriminatory *effects* are plainly not *intentional* discrimination.

b. The lower courts, too, have always appreciated that failure to accommodate religion is not intentional discrimination. *E.g.*, *Reed v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 564 F.3d 781, 784 (6th Cir. 2009) ("There are two basic types of religious discrimination claims that an individual may bring," *i.e.*, "disparate treatment claims and religious accommodation claims."); *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1034 (8th Cir. 2008) ("The district court properly instructed the jury that intentional religious discrimination and the failure to reasonably accommodate an employee's religion are distinct Title VII claims."); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) ("A plaintiff who fails to raise a reasonable inference of disparate treatment on account of religion may nonetheless show that his employer violated its affirmative duty under Title VII to reasonably accommodate employees' religious beliefs."); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) ("Besides forbidding intentional discrimination, Title VII requires an employer to try to accommodate the religious needs of its employees ...."); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 281 (3d Cir. 2001) ("[E]mployees may assert two theories of religious discrimination: 'disparate treatment[]' ...

and 'failure to accommodate.'") (footnote omitted); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1018 (4th Cir. 1996) (beyond "disparate treatment," plaintiff "can also bring suit based on the theory that the employer ... fail[ed] to *accommodate* her religious conduct").

Indeed, the lower courts have adopted different proof frameworks in light of the differences between the two theories. *See Shapolia*, 992 F.2d at 1037 (elements of failure-to-accommodate claim do not apply in "straightforward disparate treatment" case); *Venters*, 123 F.3d at 972 ("accommodation framework ... has no application" to disparate-treatment claim, which is "no different in kind from that presented in the familiar cases of race, sex, and age discrimination"). In disparate-treatment cases, courts use the *McDonnell-Douglas* framework to identify the employer's subjective motive for the adverse action. *E.g.*, *Abramson*, 260 F.3d at 281-82. By contrast, motive is irrelevant in accommodation cases. Courts hold that employees in those cases must instead show that the employer had notice of a religious conflict yet did not offer accommodation; the burden then shifts to the employer to prove that accommodation would have caused undue hardship. *Thomas*, 225 F.3d at 1155 n.6 (noting that "purpose of the burden-shifting mechanism differs in ... a religious discrimination failure to accommodate case" because it is not used "to probe the subjective intent of the employer"); *see also Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1284 (7th Cir. 1996) ("Because this is not a disparate treatment case, the *McDonnell-Douglas* burden-shifting method of proof is unnecessary and inappropriate here.").

In short, the Circuits have always distinguished between intentional discrimination and claims based on failure to make exceptions to neutral rules. No court has ever suggested that the former somehow encompasses the latter.

c. Further, it is clear that Congress was keenly aware of the difference between intentional discrimination and the failure to accommodate those with special needs.

In the new remedial provisions enacted as part of the Civil Rights Act of 1991, Congress expressly separated the two theories in the disability context. It authorized monetary relief *both* against defendants "who engaged in unlawful intentional discrimination" under the Rehabilitation Act or its regulations, *and* against those who "violated the requirements of [that law and regulations] ... concerning the provision of a reasonable accommodation." 42 U.S.C. § 1981a(a)(2). Congress must have understood the two theories to be distinct, or else the latter clause was superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Nor was this simply a question of labels. Rather, Congress attached substantive legal effect to the distinction, providing a "good faith" defense to this new monetary liability only "where a discriminatory practice involves the provision of a reasonable accommodation" under the disability discrimination laws. 42 U.S.C. § 1981a(a)(3). No such defense exists in cases of intentional disability discrimination.

On the EEOC's theory, by contrast, intentional discrimination *encompasses* failure to accommodate. That renders Congress's choice of language nonsensical. It would also fundamentally distort the remedial scheme, allowing money damages in Title

VII accommodation cases even though Congress allowed them only for (i) *intentional* discrimination under Title VII, and (ii) failure to accommodate *disabilities*. *See id.* § 1981a(a)(1) (damages for Title VII intentional discrimination); *id.* § 1981a(a)(2) (damages for intentional disability discrimination and also failure to accommodate disabilities). But "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983)). "Had Congress intended to" authorize money damages for Title VII accommodation claims, "it presumably would have done so expressly as it did in the immediately following subsection," regarding disability claims. *Id.*

Even worse, the EEOC's theory would authorize money damages in Title VII accommodation cases *without* a good-faith defense, even though Congress was careful to include one for claims based on failure to accommodate disabilities. 42 U.S.C. § 1981a(a)(3). Congress would not have immunized employers who make "good faith efforts" to accommodate disabilities, but left exposed those who make a good-faith effort to accommodate religious practices. Rather, Congress included no good-faith *defense* for claims on a failure-to-accommodate theory because it established no monetary *liability* in the first place.

In short, the EEOC's argument is at war with basic antidiscrimination law and makes a mess of a statute that Congress crafted based on the well-recognized distinction between failure to accommodate and intentional discrimination.

d. Finally, the EEOC itself, both in its longstanding guidance and in its litigation below, has recognized that enforcing a neutral rule that conflicts with a religious practice is *not* disparate treatment. Its brief in this Court appears to be the agency's first contrary suggestion.

"A religious accommodation claim is *distinct* from a disparate treatment claim, in which the question is whether employees are treated equally." *Compliance Manual*, § 12-IV (emphasis added). "An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion," *id.*—a form of *special*, rather than *equal*, treatment.

Indeed, to exemplify an "accommodation" claim, as opposed to a disparate-treatment claim, the EEOC imagines an employee who "ask[s] for an exception" to a "dress or grooming policy that conflicts with [her] religious beliefs or practices." *Id.* § 12-IV.C.4.a. It thus effectively describes Abercrombie's Look Policy as presenting a failure-to-accommodate claim, in contradistinction to an intentional-discrimination claim. *See also* 29 C.F.R. § 1605.2(a) (distinguishing "obligation ... to accommodate the religious practices of employees" from "other obligations under title VII not to discriminate on grounds of religion").

Consistent with that distinction, the EEOC below pressed only a failure-to-accommodate theory, *not* a disparate-treatment theory. The phrases "disparate treatment" and "intentional discrimination" do not appear in the EEOC's summary judgment briefs, Tenth Circuit briefs, or certiorari petition. And the only mention of "intentional discrimination" in the EEOC's certiorari reply expressly *distinguished* this

case from another case that "address[ed] intentional discrimination, not religious accommodation." (Govt. Cert. Reply 7 n.*.) The EEOC's complaint likewise alleged only that Abercrombie "failed to accommodate [Elauf's] religious beliefs by making an exception to the Look Policy." D.Ct. Dkt. 2, ¶6. And in seeking summary judgment and defending it on appeal, the EEOC invoked the Tenth Circuit's *Thomas* decision, 225 F.3d 1149. (Govt.C.A.Br.25; SJ Br., Dkt. 68, at 16-17.) Yet *Thomas* was an accommodation case; it held that the plaintiff had not "raised an intentional religious discrimination claim distinct from his claim that [defendant] failed reasonably to accommodate his religious beliefs," and so could not press that "distinct" claim. 225 F.3d at 1157 n.9. Moreover, the court said, any such claim would fail, because the plaintiff "offered no evidence that [defendant] acted out of a discriminatory motive against his religion," or that its neutral explanation was "pretextual." *Id.*

In short, the EEOC has never before suggested that failure to accommodate religious practice equals disparate treatment, and it previously litigated this case on the contrary premise. It shifted theories only in this Court, evidently after realizing that only an intentional-discrimination theory could salvage its purely monetary award. *See supra*, Part I.A.

3. In the face of all of this, the EEOC makes two counterarguments. Both misconstrue the nature of intentional discrimination.

*First*, the EEOC suggests that when an employer "correctly understands" that an employee's basis for non-compliance with a neutral work rule is religious, the employer intentionally discriminates by enforcing the neutral policy against the employee. It cites the

tort principle that one intends whatever he knows to be "substantially certain to result" from an action. (Govt.Br.24.) But, as this Court explained in *Feeney*, that is not the test for intentional discrimination: A "volitional" act with "foreseeable" adverse effects on a protected class is not intentionally discriminatory. 442 U.S. at 278. "'Discriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences." *Id.* at 279. Even actual knowledge of an employee's religious basis for violating a neutral work rule thus does not suggest that the employer enforced the rule "'because of,' not merely 'in spite of,'" that religious basis. *Id.* Mere *knowledge* of a protected trait is obviously not the same as *intent to discriminate because of* that trait.

*Second*, the EEOC argues by syllogism from Title VII's text: The statute proscribes the refusal to hire "because of" religion; "religion" includes "religious practice"; and since Elauf's headscarf happened to be a "religious practice," refusing to hire her based on it is intentional religious discrimination. (Govt.Br.23.)

That syllogism fails because the fact that Elauf's headscarf was religious was *irrelevant* to the decision not to hire her. "Because of," as this Court recently reiterated, means "by reason of" or "on account of," implying the causal link associated with a "disparate-treatment claim." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). But here, religion was not a "but-for" cause, *id.*, of the adverse action: The same result would have followed even if Elauf's conduct had *not* been religious. Nor was it even a "motivating factor." 42 U.S.C. § 2000e-2(m). After all, the Look Policy applies *equally* to secular headwear. At most, then, Abercrombie discriminates "because of" *all*

headwear. But that is not discrimination "because of" religion or religious practice. To hold otherwise collapses the basic distinction between disparate treatment and failure to accommodate.[2]

Accordingly, just as a neutral seniority system is not intentional discrimination "because of" Sabbath observance, *Hardison*, 432 U.S. at 82, and a neutral ban on drug use is not intentional discrimination "because of" the religious practice of ingesting peyote, *Smith*, 494 U.S. at 886 n.3, a neutral headwear ban is not intentional discrimination "because of" the religious practice of wearing a headscarf. In each case, similarly situated religious and secular practices are treated exactly the same.

Linguistically, the flaw in the EEOC's syllogism is that it misunderstands the role of the adjective "religious" in the phrase "religious practice." By way of illustration, to say that someone was fired "because of" his "messy beard" plainly means that it was the *messiness* of his beard that was determinative—not that *any* beard would have been a firing offense. Likewise, to say that an employer discriminated against someone "because of" his "religious practice" necessarily means that the discrimination was based

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[2] Contrary to the EEOC's passing suggestion (Govt.Br.23), Title VII's "motivating factor" or "mixed-motive" framework thus does not apply here. Abercrombie's argument is not that "other factors" beyond the headscarf "also motivated" its action. 42 U.S.C. § 2000e-2(m). It admittedly acted based on the headscarf—but not its *religious* character, and the action was thus not disparate treatment based on religion. Abercrombie "would have taken the same action" even if Elauf had worn her headscarf for other reasons, and so even on a mixed-motive theory, a court could "not award damages." *Id.* § 2000e-5(g)(2).

on the *religious nature* of the practice, not that the practice was objectionable regardless of its basis. In other words, discrimination "because of religious practice" implies that a similar secular practice would not have triggered the same result. The contrary reading—that an act is "because of religious practice" even if it would have been taken *regardless* of religion—ignores that Title VII proscribes only action taken "because of ... *religion*." 42 U.S.C. § 2000e-2(a) (emphasis added). Religion, to be sure, "includes" religious practices, *id.* § 2000e(j), but the statute remains directed at *religious discrimination*. Downplaying the word "religious" in "religious practice," as the EEOC does, is fundamentally out-of-step with that basic mandate.

Tellingly, even the EEOC does not truly embrace its own syllogism, because it admits that an employer that has *no idea* that a practice is religious does not intentionally discriminate by enforcing a neutral rule against the practice. (Govt.Br.23.) It would be absurd to claim otherwise. *See Raytheon*, 540 U.S. at 54 n.7 (if defendant was "truly unaware" of disability, plaintiff "cannot, *ipso facto*, have been subject to disparate treatment"). But, in such a case, the action is no less "because of" a "religious practice" than here; the causal link between a practice that happens to be religious and the adverse action is identical. To distinguish this case, the EEOC thus adds a new element: To be liable, an employer must "correctly understand" the religious conflict. (Govt.Br.22.) But that invented limit is wholly atextual and simply repeats the fallacious argument rejected in *Feeney*—that being *aware of* effects on a protected class is equivalent to intentionally discriminating "because of" a protected trait. That is not the law.

### C. Title VII Also Forbids Certain Actions with Discriminatory *Effects*, But That Is Distinct from *Intentional* Discrimination.

To be sure, intentional discrimination is not the only conduct proscribed by Title VII. The statute also forbids some neutral rules with discriminatory *effects*. In the religion context, that concept has given rise to claims alleging "failure to accommodate" religion. But, as noted, courts and the EEOC have distinguished that theory of relief from intentional discrimination. And, because the EEOC no longer presses an accommodation theory (which could not trigger money damages), it is not presented here.

1. In *Griggs*, this Court construed Title VII to reach beyond intentional discrimination. The employer there required employees to have a high-school diploma and pass a standardized test. *See* 401 U.S. at 425-26. Although those policies were adopted "without any 'intention to discriminate,'" *id.* at 432, that was not dispositive. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures ... that operate as 'built-in headwinds' for minority groups," because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* Policies "neutral on their face, and even neutral in terms of intent," still violate Title VII, the Court held, if they burden a protected trait and are not justified by "business necessity." *Id.* at 430-31. That theory is now known as adverse (or disparate) impact.

2. In the context of religion, this discriminatory-effects theory means that even if a work rule is "neutral on [its] face, and even neutral in terms of intent," it may still violate Title VII, if it has

"*consequences*" that "operate as 'built-in headwinds'" for religious minorities. *Id.* at 430-32. To avoid such effects, the employer may be required to affirmatively offer religious accommodation. Although no duty to accommodate is separately expressed in the statutory text, which only prohibits *discrimination* and creates a *defense* if an accommodation would impose undue hardship, *see* 42 U.S.C. §§ 2000e-2(a), 2000e(j), courts have derived a failure-to-accommodate theory based on *Griggs*' adverse-impact theory of discrimination.

a. Analytically, a claim that a neutral rule imposes adverse effects on a religious practice is akin to a claim that a neutral rule has an adverse effect on a particular race or sex. For example, courts have held that grooming rules forbidding beards have an adverse impact on blacks, because many black men suffer from a skin condition that makes shaving impossible. *E.g.*, *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 796-99 (8th Cir. 1993). Courts have thus required those employers to grant exceptions—*i.e.*, accommodations—to the neutral policy. *E.g.*, *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 59 (D. Colo. 1981). Of course, beards are also often worn for religious reasons, and the EEOC has filed materially identical lawsuits demanding *religious* exemptions to no-beard rules. *E.g.*, *EEOC v. United Parcel Serv.*, 94 F.3d 314, 315 (7th Cir. 1996). Religious-accommodation suits are thus complaints about discriminatory effects of neutral rules. *Id.* at 317 n.3 ("Religious practice cases ordinarily stem, as do 'disparate impact' cases, from the application of some neutral employment policy which has the effect ... of excluding certain employees ... "). Failure to accommodate religion is just adherence to a policy with discriminatory *effects* on religious practice. *See generally* Christine Jolls,

*Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 651-53 (2001).

b. Historically, too, the accommodation theory of religious discrimination was justified by the EEOC and adopted by Congress and the courts as an application of the *Griggs* approach to Title VII.

When Title VII was enacted in 1964, it did not include the special definition of religion that sweeps in religious "observance and practice" and exempts practices that cannot be accommodated absent undue hardship. It merely forbade discrimination "because of ... race, color, religion, sex, or national origin." *See* Civil Rights Act of 1964, § 703(a), Pub. L. No. 88-352, 78 Stat. 255. The question soon arose whether that prohibition covered only intentional discrimination or also rules that are discriminatory "in effect."

The EEOC aggressively urged the broad view. It promulgated regulations providing that, to avoid "discriminatory effects," employment tests that "adversely affect[] ... classes protected by title VII constitute[] discrimination" unless validated as predictive of job performance. 35 Fed. Reg. 12333, 12334 (Aug. 1, 1970). As to religious discrimination, the EEOC likewise took the position that "the duty not to discriminate on religious grounds ... includes an obligation ... to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship." 32 Fed. Reg. 10298, 10298 (July 13, 1967). The EEOC thus urged a consistent effects-based approach throughout the statute.

Courts were, at least initially, more guarded. In *Griggs*, for example, the Fourth Circuit held that the employer's requirements were permissible because

they were adopted without discriminatory intent. *See* 420 F.2d 1225, 1232-35 (4th Cir. 1970) (because policies applied to all races, "it could not be said that [plaintiffs] have been discriminated against").

Courts addressing employee challenges to neutral policies that impeded religion similarly divided over whether the law required accommodations. *Compare, e.g., Jackson v. Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276, 1278 (E.D. La. 1969) (employee fired for refusing work on Sabbath was "discharged because of her religion"), *with Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 330 (6th Cir. 1970) (termination for Sabbath observance "was not discrimination on account of ... religion" but rather for violation of "provisions of the collective bargaining agreement" that "were applicable equally to all employees").

This Court then decided *Griggs* in March 1971, reversing the Fourth Circuit and recognizing the adverse-impact theory of racial discrimination under Title VII. A month later, the Court heard argument in *Dewey*, to consider whether the Sixth Circuit had similarly erred by limiting religious discrimination to intentional discrimination. 402 U.S. 689 (1971).

Notably, the Government filed an *amicus* brief in *Dewey*, arguing that *Griggs* compelled reversal. Employment policies that are "neutral on their face" yet "have a religiously discriminatory effect" are unlawful under "this Court's recent decision in *Griggs*," the EEOC said, unless they are compelled by business necessity—a concept "reflected in" the EEOC's regulation "requir[ing] employers to make 'reasonable accommodations to the religious needs' of their employees." Br. for United States as Amicus Curiae at *7, *13, *Dewey*, 402 U.S. 689, 1971 WL

133107. The Government thus defended the EEOC's rule as simply the religious manifestation of *Griggs*.

*Dewey* was affirmed by an equally divided Court, 402 U.S. 689, likely because of "[o]ther factors" that made the case a poor vehicle. *Hardison*, 432 U.S. at 73 n.8 (noting that *Dewey* also presented questions whether EEOC rule was entitled to retroactive effect, whether earlier arbitrator's ruling was conclusive, and whether employer satisfied accommodation duty in any event). As a result of that affirmance without opinion, the law "remained unsettled" on whether or how *Griggs* applied to religion claims. *Id.* at 73.

Shortly thereafter, in 1972, Congress sought to "resolve by legislation" that issue. 118 Cong. Rec. 706 (Jan. 21, 1972) (Sen. Randolph). It clarified that "religion" includes religious "practice," but provided employers a defense where accommodation would cause "undue hardship"—the EEOC's standard from its regulation. Equal Employment Opportunity Act of 1972, § 2(7), Pub. L. No. 92-261, 86 Stat. 103. Legislative history made clear that Congress directly "disapproved" *Dewey*'s holding that accommodation is not required. *Hardison*, 432 U.S. at 74 n.9.

After *Griggs* and the 1972 amendment, the lower courts recognized that their earlier cases rejecting challenges to religion-neutral policies were no longer good law. The Sixth Circuit, for example, reasoned that "[w]hatever doubts there may have been about ... this [EEOC] regulation or its consistency with the statute have been, we believe, laid to rest by a unanimous Supreme Court in *Griggs*." *Reid v. Memphis Publ'g Co.*, 468 F.2d 346, 350 (6th Cir. 1972). An "additional reason" for so holding was that the 1972 amendment "incorporate[d] the substance of"

the EEOC rule. *Id.* at 350-51. The question was thus not whether the employer's "rules were intentionally discriminatory as to religion, but rather whether [it] could make 'reasonable accommodation.'" *Id.* at 351.

Similarly, in requiring accommodation of employees' Sabbath observance, the Fifth Circuit began with the statute as construed by *Griggs*, used the EEOC regulation to corroborate that reading of the statute, and then cited the 1972 amendment as "lay[ing] to rest" any "doubt" over whether that rule had "truly expressed the will of Congress." *Riley v. Bendix Corp.*, 464 F.2d 1113, 1115-16 (5th Cir. 1972). Again, the EEOC agreed. Br. for United States as Amicus Curiae at *35, *Hardison*, 432 U.S. 63, 1977 WL 189773 (explaining that if "as *Griggs* ... teaches," Congress may address "discriminatory consequences of employment practices" and not merely "intentional discrimination," accommodation may be required).[3]

In sum, the accommodation theory of religious discrimination was developed by the EEOC in a parallel regulation to its rules forbidding adverse-impact race discrimination; defended as an application of *Griggs* in the religious context; and adopted by Congress to codify that rule.

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[3] State courts, too, cite *Griggs* to explain why laws forbidding religious discrimination include an implicit duty to accommodate. *E.g.*, *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193, 201-02 (Wash. 2014); *Rankins v. Comm'n on Prof'l Competence*, 593 P.2d 852, 855-56 (Cal. 1979); *Wondzell v. Alaska Wood Prods., Inc.*, 583 P.2d 860, 864 n.4 (Alaska 1978); *Me. Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union AFL-CIO*, 383 A.2d 369, 375-78 (Me. 1978).

3. This statutory history further corroborates that failure to accommodate religion is not a form of intentional discrimination, as the EEOC argues here, but rather grows out of a distinct theory that focuses on the adverse *effects* of facially neutral rules.

Beyond that, the history also confirms the failure of the EEOC's textual syllogism. Again, the EEOC argues that an employer who refuses to hire an applicant "because of" a headscarf that happens to be a "religious practice" necessarily commits intentional discrimination in violation of Title VII. (Govt.Br.23.) As explained above, if the failure to hire is based on a religion-neutral rule, it is not "because of" religion or religious practice on the ordinary meaning of that phrase. *See supra*, Part I.B.3.

For that reason, many have argued that *Griggs*' imposition of liability for neutral policies must stem from other aspects of the statute. *See Smith v. City of Jackson*, 544 U.S. 228, 235-36 (2005) (plurality op.); *id.* at 250 (O'Connor, J., concurring in judgment) (debating basis for *Griggs*). But others, including the Government, have argued that *Griggs* adopted a broader gloss on the words "because of." *E.g.*, Br. for the United States as Amicus Curiae at 19-21, 31-32, *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, No. 13-1371 (U.S. Dec. 2014). On that understanding, *Griggs* construed Title VII to mean that an employer discriminates "because of" protected traits by enforcing rules with unintentional adverse effects on individuals with those traits. Firing someone "because of race" could mean, on that view, either true race-conscious disparate treatment or the type of race-neutral policy in *Griggs*.

But, even if so, the EEOC's syllogism answers the wrong question. To obtain reversal, the EEOC must establish that Abercrombie committed *intentional discrimination*. So if Title VII forbids discriminating "because of" a protected trait in two distinct ways—by treating employees with the trait worse than similarly situated comparators, or by taking action that unintentionally has an adverse effect on those with the trait—then the EEOC must show that Abercrombie acted "because of" religion in the *former* sense. That, as explained, it cannot do. Abercrombie declined to single out religion for *special favor*, but that at worst could be "because of" religion only in the looser, *Griggs* sense. It clearly did not single out religion for *special disfavor*—the only meaning of "because of" that reflects intentional discrimination.

## II. IF THIS COURT REACHES THE ISSUE, IT SHOULD HOLD THAT EMPLOYERS CANNOT BE LIABLE ABSENT ACTUAL KNOWLEDGE OF A RELIGIOUS CONFLICT.

An effects-based claim premised on Abercrombie's failure to accommodate may well be the more apt way to analyze this case. But as explained, the EEOC presses only an intentional-discrimination claim, because it is the only one that could support the relief at stake. This case therefore offers no opportunity to explore effects-based claims, the parameters of such claims, or the applicable *mens rea*. It surely presents no opportunity to resolve the disagreement between the Tenth Circuit and the EEOC, because neither "actual knowledge" of a religious conflict (the Tenth Circuit's view) nor a "correct understanding" (the EEOC's view) could support the intentional-discrimination claim here. Only *intent* could do so,

and intent is clearly absent. That should be the end of the case (either through affirmance or dismissal).

If this Court nonetheless reaches the question whether an employer can be liable for failure to accommodate even absent actual knowledge of the religious conflict, the judgment below should still be affirmed. The EEOC's position—that employers are liable if they "correctly understood" (or "suspect[ed]") a conflict—has no basis in the statute or caselaw. It is utterly impractical. It would encourage if not require employers to stereotype and intrusively probe applicants' religious beliefs. And there is no need for it: The employee will usually be best suited to broach the issue—which is why requiring the employee to do so has been a satisfactory rule for decades.

### A. Employees and Applicants Should Bear the Burden To Raise Any Religious Conflicts.

Practically, the difference between the Tenth Circuit's position and the EEOC's amounts to this: Who bears the burden of first broaching a potential religious conflict? The Tenth Circuit puts that burden on the employee. The EEOC would, in effect, shift it to the employer. The former rule, unlike the latter, is supported by both precedent and policy.

1. Until this case, the EEOC itself took the position that employees bear the burden of advising of religious conflicts. The regulation that addresses religious accommodation, after first repeating the key statutory language, 29 C.F.R. § 1605.2(b)(1), states that "*[a]fter* an employee or prospective employee notifies the employer ... of his or her need for a religious accommodation, the employer ... has an obligation to reasonably accommodate," *id.* § 1605.2(c)(1) (emphasis added).

The EEOC weakly insists that the regulation does not expressly *reject* an accommodation duty *absent* notification (Govt.Br.24), but recognizing a duty *after* being given notice "creates a clear negative implication" that no duty exists otherwise. *Custis v. United States*, 511 U.S. 485, 491 (1994). The EEOC so admitted when it promulgated the rule, explaining that the "obligation to accommodate *begins* when an individual notifies the employer of the need for an accommodation." 45 Fed. Reg. 72610, 72610 (Oct. 31, 1980) (emphasis added). *Accord Compliance Manual*, § 12-IV.A.1 (applicants "must make the employer aware" of "need for accommodation" and that its basis is "a conflict between religion and work").

At a minimum, these earlier statements belie the agency's current contention that putting the burden on the employee would trigger all sorts of bad policy consequences. (Govt.Br.24-28.) For forty years, even the EEOC thought that it worked just fine.[4]

By contrast, the EEOC asks the Court to ignore what it said in the past and defer to what it says now. (Govt.Br.31-33.) Indeed, the EEOC issued—after the Tenth Circuit decision below—a new publication that

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[4] Apart from its briefs below, the only source the EEOC cites to show that it "here and elsewhere" eschewed an actual-knowledge test (Govt.Br.31) is a district-court brief in which it said that "an employee need not explicitly ask for a religious accommodation" *after* apprising the employer of the religious conflict. EEOC Br. at 14, *EEOC v. GKN Driveline N. Am., Inc.*, 1:09CV654, 2010 WL 5093776 (M.D.N.C. Dec. 8, 2010). The employer in that case indisputably had actual knowledge of the conflict, because the employee expressly told it that, "because of my religion, I would rather take the urinalysis than the swab test." *GKN*, 2010 WL 5093776, at *6.

adopts its litigation position in this case. *Supra* n.1. But no deference is owed to that litigation-driven flip-flop. Under *Skidmore v. Swift & Co.*, which the EEOC admits is the standard (Govt.Br.31), deference turns on the "consistency [of the agency view] with earlier ... pronouncements." 323 U.S. 134, 140 (1944). The EEOC's new position is anything but consistent. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference "unwarranted" if construction "conflicts with a prior interpretation" or represents "convenient litigating position"); *see also* 42 U.S.C. § 2000e-12(b) (allowing defense to Title VII liability for reliance on "written interpretation ... of the Commission," even if later "modified").

2. The ADA offers an instructive analogy for why the burden should be on employees to request an accommodation. The ADA mandates "reasonable accommodations to the *known* physical or mental limitations" of a disabled person, absent undue hardship to the employer. 42 U.S.C. § 12112(b)(5)(A) (emphasis added). That is, "the employer must know of ... the disability" before it is obliged to do anything. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999). Thus, "before an employer's duty to provide reasonable accommodations—or even to participate in the 'interactive process'—is triggered[,] the employee must make an adequate request." *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011); *see also Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346-47 (4th Cir. 2013). After all, a disability may not be "open, obvious, and apparent to the employer," but instead "uniquely within the knowledge of the employee." *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996).

The EEOC also generally discourages unsolicited efforts by employers to discover employee disabilities. The statute itself prohibits pre-selection inquiries into applicant disabilities, 42 U.S.C. § 12112(d)(2)(A), and an employer cannot ask if an applicant "needs a reasonable accommodation" unless it "*knows* that an applicant has a disability," EEOC, *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, http://www.eeoc.gov/policy/docs/accommodation.html (Oct. 2002) (emphasis added). Actual knowledge, rather than employer-prying, is thus the rule for the ADA.[5]

3. The employee should also bear the burden of first raising the issue of religious accommodation.

In deciding how to allocate the burden of raising a religious conflict, it is appropriate to consider which party is typically best suited to bear it. *See Delo v. Lashley*, 507 U.S. 272, 277-78 (1993) (considering whether states or defendants are "better positioned" to adduce criminal-history evidence); *Martin v. Wilks*,

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[5] Contrary to its current claim (Govt.Br.32), the EEOC has not previously defied the ADA's plain text by rejecting an actual-knowledge standard. *See* EEOC Reply Br. at 16, *EEOC v. Agro Distrib. LLC*, 555 F.3d 462 (5th Cir. 2009) (admitting that the duty turns on "whether the *employee* ... provides the employer with enough information that ... the employer can be fairly said *to know* of both the disability and the desire for an accommodation" (emphasis added)); EEOC Br., *Freadman v. Metro. Prop. & Cas. Ins. Co.*, 484 F.3d 91 (1st Cir. 2007) (acknowledging that duty generally "must be triggered by a request" and that employer must attempt to provide an accommodation if it "*knows* of a disability" (emphasis added)).

490 U.S. 755, 767 (1989) (parties "best able to bear the burden" of joining affected non-parties).

Here, it is clear that applicants or employees are, as a general matter, better suited than employers to first raise the prospect of a religious conflict. As the EEOC explains, to recognize a religious conflict one must understand (i) the employee's religious practice and (ii) the conflicting workplace rule. (Govt.Br.29.) The employee will always know the former, and the employer will always know the latter. The employer, however, will *never* independently know that the employee's conflicting practice is religious. Rather, given the multitude of religious beliefs (Pet.App.18a) and their "uniquely personal and individual" nature (Pet.App.48a), the "key questions that determine whether an employer has an obligation under Title VII to provide a reasonable religious accommodation ordinarily are only within the ken of the applicant or employee" (Pet.App.46a). *See Great Lakes*, 330 F.3d at 935-36 ("A person's religion is not like his sex or race—something obvious at a glance," and "employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects."). At most, an employer could guess or infer that an employee's practice is motivated by religion.[6]

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[6] Given the personal nature of religious belief, an employer would typically obtain actual knowledge only from the employee personally. In rare cases, *e.g.*, if an employee tells a co-worker who in turn tells the employer, knowledge might come indirectly. *E.g.*, *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999) (knowledge from previous employer); *see Compliance Manual* § 12.IV.A.1 n.120 (citing *Hellinger*). (Govt.Br.33.) The Tenth Circuit allowed for that possibility, but here Abercrombie lacked actual knowledge from *any* source. *See* Pet.App.34a.

By contrast, the employee will ordinarily be aware of, or come to understand, the applicable work rules. After all, such rules are necessarily disclosed to those expected to abide by them. In the *typical* case, then, the employee will be positioned to inquire about the potential conflict; the employer will not.

The EEOC objects that this will not *always* be true: Some applicants might not know the work rules and thus not recognize the conflict or think to request accommodation. (Govt.Br.27-30.) But even if the EEOC's rule "solves" its hypothetical, the cure is worse than the disease. Even on the EEOC's view, shifting the burden to employers who lack actual knowledge is advantageous only if (i) the applicant's observable practice is so obviously religious that the employer "correctly understands" its basis; but (ii) the work rules are unknown to the applicant and the employer does not mention them; and (iii) the employer provides no reasons for its adverse action. This is a rare coincidence of events, as illustrated by the EEOC's failure to identify *any case* presenting them. *Cf. infra*, Part II.B.1 (distinguishing cases).[7]

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[7] Indeed, even this highly unusual case does not present those facts. Elauf, after all, knew enough about Abercrombie to ask her friend who worked there whether her headscarf would be problematic. An assistant manager who had nothing to do with the hiring process told Elauf's friend that a headscarf should be okay, but Elauf herself evidently placed little stock in his relayed advice: that manager also said a *black* headscarf would be prohibited, yet she wore one to the interview. *Supra* at p.10; Pet.App.44a n.11. Cooke also described the Look Policy at the interview and prompted Elauf to ask any questions. *Supra* at p.11. It is thus hard to conclude that Abercrombie is more at fault than Elauf for not pursuing further inquiries.

On the other hand, the EEOC's rule shifts the burden *whenever* the employer assumes or even just "suspect[s]" a "potential" conflict (Govt.Br.21)—an indeterminate, potentially enormous set of cases—even if the employee is fully aware of the conflict and chooses to say nothing. Not only is there no basis to shift the burden in that far more common situation—why should the employer with mere *suspicion* bear the burden over the employee with full *knowledge*?—but the EEOC's rule would also trigger adverse policy effects in all those cases. *Infra*, Part II.B. Moreover, by muddying the waters on who bears the burden, the EEOC's rule may sow additional confusion for employees, potentially inducing their silence and leading to *more* "missed" accommodations. (*Cf.* Govt.Br.26-27.)

Put another way, the EEOC is asking for a rule to address a hypothetical scenario, even though in the mine run of cases it would lead to worse outcomes.

At bottom, the EEOC's true complaint is that employees and applicants sometimes are not told the ground for adverse action against them. That surely makes it harder to vindicate their right to be free of discrimination (based on *any* protected trait). But that concern is simply a policy argument against employment-at-will doctrine, which allows employers to act without even having reasons, much less disclosing them. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008). Whatever the merits of that well-settled rule, this Court should not twist Title VII law so as to effectively overturn it.

### B. The "Suspect a Possible Conflict" Standard Is Invented, Unadministrable, and Inequitable.

The EEOC's position is that an employer need not have "actual knowledge" that a certain practice is motivated by religion to be liable for taking adverse action against it. It suffices, the EEOC says, if the employer "correctly understands" that the practice is religious (Govt.Br.18-20), or "suspects" a "possible" conflict between religion and work rules (Govt.Br.21, 30). That standard, invented from whole cloth, would lead to a host of practical problems and ultimately be at war with Title VII's most basic purpose—combating stereotypes based on protected traits.

1. The EEOC's test has no basis in Title VII's text, *see supra*, Part I.A.3, or in caselaw. The EEOC's petition for certiorari cited three cases as allegedly conflicting with the Tenth Circuit, but none of them adopted the "correctly understands" test or "suspect a possible conflict" standard. Those employers *facially* discriminated against religion or had *actual knowledge* of the religious conflict.

In *Dixon*, a rental complex prohibited "religious items" in the management office out of fears that such displays would violate the Fair Housing Act. 627 F.3d at 853. And in *Brown v. Polk County*, the employer specifically forbade "*religious* proselytizing, witnessing, or counseling." 61 F.3d 650, 652 (8th Cir. 1995) (en banc) (emphasis added). Unlike the Look Policy, these policies facially singled out religious conduct for distinct treatment, and so the employers could hardly have complained they did not know the conduct was religious—that was precisely why they punished it.

As for *Heller v. EBB Auto Co.*, the plaintiff there told his employer that his wife was converting to Judaism and that he needed time off to attend the ceremony. *See* 8 F.3d 1433, 1437 (9th Cir. 1993). A religious conversion could hardly be anything other than religious, and so the Ninth Circuit rejected the employer's complaint that it lacked notice. *See id.* at 1439. That is a far cry from holding that an employer with no actual knowledge of a religious conflict could still be liable for failure to accommodate.

2. Because its rule cannot be justified under Title VII's text or prior judicial interpretation, the EEOC principally argues that it reflects good public policy. (Govt.Br.24-28.) Just the opposite.

a. To start, its test is woefully unclear. The EEOC's own brief wobbles between formulations that suggest very different levels of awareness. It sometimes says that an employer's "understand[ing]" is needed (Govt.Br.18-20), implying a high confidence level. But it also repeatedly mentions obligations for employers who "suspect a possible religious conflict" (Govt.Br.21, 30), a seemingly much lower degree of recognition. And either way, what do those abstract standards mean? Is an assumption enough to form an "understanding"? What about a hunch or a guess? An *educated* guess? Must the "understanding" be based on a confidence level, like preponderance of the evidence? The EEOC never deigns to explain its rule. *Cf. Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2449-50 (2013) (rejecting EEOC's definition of "supervisor" as "study in ambiguity" with "no clear meaning" that would "present daunting problems" for lower courts).

The EEOC is also strategically ambiguous over whether its test is purely *subjective* or would also

hold employers liable if they *should have* understood or suspected the possible conflict, but did not. Its brief now suggests the former, yet its earlier filings included an objective prong. At the certiorari stage, for instance, the EEOC suggested that an employer could be liable "even if [it] failed to grasp the need for an accommodation at all, so long as a reasonable person would have understood the conflict." Pet. 23. The EEOC will undoubtedly advocate that broader, objective view in the next case. Indeed, its *amici* have already made the jump, contending that employers deserve, at most, "inquiry notice"—once an employer learns "a potential conflict *may* exist," it must "inquire further." Religious & Civil Rights Orgs. Amici Br. 26; *see also* Ariz. Amici Br. 5 ("[O]nce the employer ... should know of [] a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict ...."); Am.-Arab Antidiscrim. Comm. Amici Br. 4 (arguing for "constructive knowledge" test).

Moreover, even if the test is purely subjective, often the best and only evidence of subjective belief is what a reasonable person would have believed under the circumstances. *Cf. Washington*, 426 U.S. at 253 (Stevens, J., concurring) ("Frequently the most probative evidence" regarding mental states is "objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."). As a result, plaintiffs will always seek to rely on such evidence, just as the EEOC's *amici* trade on the supposedly obvious religious nature of headscarves. *E.g.*, CAIR Amicus Br. 13-16. *But see* JA38-39; JA236-37 (EEOC expert admitting that some women wear headscarves for non-religious cultural reasons); JA130-31 (photographs of Elauf).

b. Whatever the EEOC's test means, it would create a host of practical problems. For one, employers would have to become familiar with an infinite variety of religious practices. *See Religious Garb Guidance*, *supra* (citing practices relating to hair, beards, clothing, jewelry, tattoos, etc.). Indeed, since a jury might later find that the employer must have (or should have) suspected the religious basis for the practice in question, employers would have to defend themselves by training line-level employees to sniff out hints of potentially protected conduct.

Even worse, employers would have to determine what information is relevant to identifying whether an employee's conduct is religious. This is, to put it mildly, a minefield. Imagine a woman who attends an interview wearing an unfashionably long skirt. On the EEOC's standard, can a fashion retailer turn her down? Or should it understand or suspect that the skirt is religious just because it knows that some women wear long skirts for religious reasons? If not, does the answer change if the applicant indicates that she attended an evangelical school? Does it also matter if her name is Grace and she wears a cross necklace? Or, imagine an applicant with a beard. Must an employer with a no-beard policy suspect a potential religious conflict because some religions require adherents to wear beards? What if the applicant's name is Mohammed or he appears of Middle Eastern descent?

The EEOC's test thus necessarily devolves into a totality-of-the-stereotypes standard, with employers forced to respond to probabilistic clues about one's most personal beliefs based on his appearance and history. Title VII was designed to *combat* such

stereotypes, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989) (plurality op.), not reinforce them.

3. In the end, the EEOC's suspicion standard forces employers into an impossible Catch-22. If they suspect a possible conflict between a work rule and an employee's religious practices, they must pry into those religious beliefs before acting. Otherwise, they could be liable for suspecting a conflict but not discussing accommodation. Yet the EEOC also warns that "[q]uestions about an applicant's religious affiliation or beliefs ... are generally viewed as ... problematic under federal law." *Pre-Employment Inquiries*, *supra*. Rather than ask applicants about their religion based on clues from their appearance or background, the EEOC advises employers to "ask[] the same questions of *all* applicants." *Compliance Manual*, § 12-II (emphasis added). And courts have encouraged the same, by holding that, if an employer asks such pointed questions, that could "permit an inference ... that an employer engaged in improper religion-based discrimination." Pet.App.25a.

Even the EEOC acknowledges that forcing employers to make these "unseemly" inquiries is unacceptable. (Govt.Br.30.) To avoid this problem, it suggests that an employer with "sufficient notice" of a possible conflict "can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would have difficulty complying." (*Id.*)

That is no solution at all. To begin with, it likely would not remove employers from the liability trap. In addition to explicitly religious questions, the EEOC is *also* suspicious of questions designed to flush out religious practices. For example, employers generally may not ask applicants whether they are

available during normal business hours, because of the "exclusionary effect" such questions can have on religious applicants. 29 C.F.R. § 1605.3(b)(2). If an employer asks anyway and then declines to hire someone who said she needed an accommodation, "[t]he Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject [the] applicant" and will put the "burden ... on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant." *Id.* § 1605.3(b)(3). Thus, merely by asking whether applicants could work during its ordinary schedule, an employer invites extra scrutiny if it later hires someone else. Here, the EEOC neither mentions these rules nor explains why similar inquiries into dress and grooming would be viewed differently.[8]

Beyond failing to cure the original problem, the EEOC's proposal leaves employers with no workable standards. To navigate between Scylla and Charybdis, employers would have to script detailed interview questions for every job in America—questions designed to unearth religious practices while avoiding the appearance of doing so. Drafting such questions will be hard enough for corporate counsel. It will be harder still to convey them—and the proper circumstances in which to deploy them—to thousands of line-level workers. Alternatively, employers would have to recite the entire employee

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[8] Indeed, one of its *amici* openly opposes any rule that would allow employers to ask applicants such neutral questions. *See* Nat'l Jewish Comm'n Amici Br. 13-15.

handbook to every applicant, to smoke out any possible conflict. Either is obviously impractical.

The EEOC's proposed solution would also transform Title VII into a civil-service statute. "The basic principle of at-will employment is that an employee may be terminated for a good reason, bad reason, or no reason at all," *Engquist*, 553 U.S. at 606; at-will employers accordingly have no obligation to tell employees why they took adverse action against them. But if the EEOC's suspicion standard prevails, employers will have to provide employees and applicants with notice and an opportunity to be heard before taking any adverse action that stems in part from non-compliance with a neutral work rule, so long as the employer merely suspects (or should suspect) the non-compliance might be religiously motivated. Title VII was not designed to impose onerous disclosure obligations on employers that wish to discipline at-will employees for violating legitimate, religion-neutral rules.

## III. THE JUDGMENT BELOW SHOULD BE AFFIRMED, BUT AT A MINIMUM, TRIABLE FACTUAL DISPUTES PRECLUDE SUMMARY JUDGMENT FOR THE EEOC.

As shown, the judgment below should be affirmed. The EEOC cannot establish intentional discrimination, the only theory that allows the compensatory damages at issue here. *Supra*, Part I. It must prove that Abercrombie treated Elauf *differently* because of her religion, but the undisputed evidence demonstrates that it declined to hire her because she did not comply with its *religion-neutral* Look Policy. *See* JA87; JA134; JA139-40.

Alternatively, even on an accommodation theory (which the EEOC has abandoned, and which cannot support the award of damages at issue), the EEOC should, at least, have to prove that Abercrombie actually knew that Elauf's headscarf was religious in nature. *Supra*, Part II. It cannot. Cooke testified that she "did not know" Elauf's religion at the time of the interview. JA102. And Elauf never mentioned religion or her headscarf to Cooke, let alone asked for an accommodation. JA31; JA33; JA78-79. Thus, Cooke merely "figured" or "assumed" that Elauf wore her headscarf for religious reasons (JA77), and advised Johnson, at most, only that she "believe[d]" Elauf wore it for such reasons, not that she knew (JA87). Accordingly, the undisputed evidence shows that Abercrombie did not have actual knowledge of Elauf's religion or need for an accommodation.

Even if this Court adopts the EEOC's rule, however, there would remain triable disputes of fact, requiring remand—not partial summary judgment for the EEOC. Specifically, Cooke and Johnson gave conflicting accounts of the call that led to Johnson's directive not to hire Elauf. (Govt.Br.36 & n.3.) Johnson testified that Cooke never shared her belief that Elauf's headscarf was religious, and that he did not make the same assumption. JA134; JA146-47. Yet it is *Johnson's* knowledge that legally matters.

Vicarious liability under Title VII turns on the mental state of the employee actually responsible for the challenged action. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (liability only if employee with unlawful intent "proximate[ly] cause[d]" adverse action); *Reeves*, 530 U.S. at 152 (liability because biased employee was "actual decisionmaker," even

though another made "formal decision" to fire). Accordingly, when employees played different roles in the process, courts examine the mindset of the one who actually made the decision. *E.g.*, *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1306 (11th Cir. 2002) (no disparate treatment when interviewer, but not decisionmaker, knew plaintiff's religion).

Johnson, not Cooke, made the decision here. Cooke's hiring authority (Govt.Br.35) was subject to caveat: "If [she] had a question about something"—such as how to apply the Look Policy—"[she] was to ask" her store or district manager. JA55-56. Thus, although Cooke "thought [Elauf] [was] a really good candidate" (JA89), she was "unsure about the head scarf" (JA87), and so called Johnson to "ask[] [for his] permission" to hire her (JA140). Cooke told Johnson that she "thought [Abercrombie] should hire" Elauf (JA89), but Johnson nonetheless instructed that she "c[ould not] hire her" because of her noncompliance with the Look Policy (JA134). Cooke complied (JA89), even though she still wished to hire Elauf (JA91). Neither Cooke nor Johnson suggested that Cooke could ignore her manager's command.

Because Johnson was the actual decisionmaker, a triable issue exists even if "correct understanding" of the religious nature of Elauf's headscarf suffices for liability. If a factfinder believes Johnson, then he did not "correctly understand" the religious conflict, and Abercrombie would not be liable even on the EEOC's test. Remand is therefore the proper course if the Court agrees with the EEOC on the law.[9]

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[9] The EEOC erroneously contends that Cooke's beliefs are in all events imputed to Abercrombie. (Govt.Br.37 n.4.) If

## CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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JANUARY 2015

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Johnson made the decision and was "truly unaware" of the religious basis for Elauf's conduct, Abercrombie's decision could not have been *based* on her religion and "*ipso facto*" could not give rise to a disparate treatment claim. *Raytheon*, 540 U.S. at 54 n.7. Nor can Cooke's mental state somehow be transferred to Johnson on the theory that she proximately caused his decision. (Govt.Br.37 n.4 (citing *Staub*, 131 S. Ct. at 1192).) Cooke did not proximately cause anything. Just the opposite: She *wanted* to hire Elauf, but was thwarted by Johnson. *See supra* at p.12.

# STATUTORY & REGULATORY ADDENDUM

No. 14-86

Equal Employment Opportunity Commission,
Petitioner

v.

Abercrombie & Fitch Stores, Inc.,
Respondent

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## 42 U.S.C. § 1981a(a)

**§ 1981a. Damages in cases of intentional discrimination in employment**

(a) Right of recovery.

(1) Civil rights. In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, and provided that the complaining party cannot recover under section 1977 of the Revised Statutes, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990, and section 505(a)(1) of the Rehabilitation Act of 1973, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable

accommodation, or section 102 of the Americans with Disabilities Act of 1990, or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

## 42 U.S.C. § 2000e (Excerpts)

**§ 2000e. Definitions**

* * * * *

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

* * * * *

## 42 U.S.C. § 2000e-2 (Excerpts)

### § 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be

an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended.

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## 42 U.S.C. § 2000e-5 (Excerpts)

### § 2000e-5. Enforcement provisions

* * * * *

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or

advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court–

(i) may grant declaratory relie injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * * * *

## 42 U.S.C. § 12112 (Excerpts)

**§ 12112. Discrimination**

**(a)** General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

**(b)** Construction. As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—

**(1)** limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

**(2)** participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

**(3)** utilizing standards, criteria, or methods of administration—

**(A)** that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is

administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

* * * * *

## 29 C.F.R. § 1605.1

**§ 1605.1 "Religious" nature of a practice or belief.**

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j).

## 29 C.F.R. § 1605.2 (Excerpts)

**§ 1605.2 Reasonable accommodation without undue hardship as required by Section 701(j) of title VII of the Civil Rights Act of 1964.**

(a) Purpose of this section. This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) Duty to accommodate. (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

* * * * *

(c) Reasonable accommodation.

(1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

* * * * *

## 29 C.F.R. § 1605.3

**§ 1605.3 Selection practices.**

**(a)** Scheduling of tests or other selection procedures. When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

**(b) Inquiries which determine an applicant's availability to work during an employer's scheduled working hours.**

**(1)** The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

**(2)** As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment

opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of

the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.